U.S. Department of Labor

Board of Alien Labor Certification Appeals
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DATE: December 8, 2000

CASE NO: 2000-INA-80

In the Matter of

SURENDRA SHAW
Employer

on behalf of

JYOTSNA SUBODH
Alien

Appearances: Thomas T. Hecht, Attorney for Employer and Alien

Certifying Officer: Dolores Dehaan, Region II

Before: Burke, Huddleston, and Jarvis
Administrative Law Judges

DONALD B. JARVIS
Administrative Law Judge

DECISION AND ORDER

This case arises from Surendra Shah's ("Employer") request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of an application for alien labor certification. The certification of aliens for permanent employment is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under §212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient

workers in the United States who are able, willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of the United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other means in order to make a good faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in the appeal file ("AF"), and any written arguments. 20 C.F.R. §656.27(c).

Statement of the Case

On June 19, 1996, the Employer filed a Form ETA 750 Application for Alien Employment Certification with the State of New York Department of Labor, Alien Labor Certification Office ("NYDOL") on behalf of the Alien, Jyotsna Subodh. (AF 12). The job opportunity was listed as "Household Cook." (AF 15-16). The job duties were described as follows:

> Prepare meals for family & guests, cook a variety of meals as may be desired by family members, prepare own menus & own specialties, bake various specialties & pastries, set table, serve & clean up after meals, buy & order provisions for the kitchen, food marketing, prepare special diets when required. Prepare such dishes as: Dal, Bhat, Puris, Rotis, Parathas, Nan, Samosas, Doasa, Sambhar, Indian Style Vegetables, Palak, panir, Malai kofta, Uudhiu, Handwau.

(AF 16). The stated job requirements for the position, as set forth on the application, are a seventh grade education and 2 years experience in the job offered. Other special requirements are "Must Live-in." (Id.).

The CO issued a Notice of Findings ("NOF") on December 17, 1997, proposing to deny certification for four reasons. (AF 31-36). First, the CO found that the duties described by employer do not appear to constitute full-time employment in the context of employer's household within the meaning of 20 C.F.R. § 656.3. (AF 35). Compliance by the Employer would require documentation of: the total number of meals prepared on a daily and weekly basis; the length of time required to prepare each meal; the individuals for whom the worker is cooking each meal on a daily and weekly basis; if the Employer entertains frequently, then the details of the frequency of household entertainment in the past year; how meal preparation/cooking was handled for business/entertainment in the past; the total number of guests entertained on each occasion; evidence that Employer has previously employed a full time cook prior to the alien; other duties besides cooking; who will perform the general household chores; who will perform the general household maintenance duties; and, any other documentation that clearly establishes and demonstrates that this is a permanent full time job offer that the Employer has customarily required. (AF 34-35). Second, citing 20 C.F.R. 656.21(b)(2)(i), the CO found that the requirement that the applicant live on the premises is not normally required for the occupation as defined in the Dictionary of Occupational Titles. The CO found the

requirement was unduly restrictive unless supported by business necessity. (AF 34). Third, the CO found the requirement of two years of specialized experience in Indian Style cooking to be unduly restrictive. (AF 33). The CO noted that the requirement that applicants have experience in a particular type of food is employer's personal preference and not a normal job requirement. Employer was instructed to either delete the ethnic/religious cooking requirements or document how the requirement arises from business necessity. (AF 32). Finally, the CO found that pursuant to 20 C.F.R. 656.20 (C)(2), Employer's wage offer must equal or exceed the prevailing wage, and that Employer's wage offer of $493.81 per week is below the prevailing wage of $15.28 per hour. (Id.). Employer was instructed to rebut this finding by increasing the prevailing rate of pay or by submitting countervailing evidence that the prevailing wage determination is in error. (AF 31).

The Employer submitted his rebuttal on January 16, 1998, consisting of a statement by Surendra Shah responding to inquiries from the NOF, a page from Employer's 1996 State Residential Tax Return, and letters from both Vijendra Shah and Mahendra Shah attesting to the fact that the Alien previously worked for both employers as a Cook. (AF 37-44). Employer argued that the Alien would prepare three meals a day for Employer, his wife and their two children. (AF 43). Employer explained that it takes about 45 minutes to one hour to prepare breakfast, two hours to prepare lunch and two hours to prepare dinner. Employer also asserted that it entertains guests about 12 times in one year and have guests over an average of once a month, with approximately 25 to 30 meals served on each occasion. The Employer also provided the following information: prior to hiring the alien, the Employer's wife prepared the meals but she now works full time as they are engaged in four different business; the worker would perform only cooking related duties; and, general household duties are performed by Employer and his wife on the weekends. (Id.). Employer provided the following schedules for his family: Employer works Monday to Friday from 5:00 a.m. to 8:00 p.m. and on Saturday from 10:00 a.m. to 5:00 p.m.; Employer's wife works Monday to Friday from 6:00 a.m. to 8:00 p.m.; and, the children, ages 14 and 13, are in school from 7:20 and 7:40 a.m. to 2:20 and 3:30 p.m., respectively. (Id.). The Employer also argued that his family is very religious and "follow certain rules very strictly such as we cannot eat meat, or eggs, or fish, or any other type of [seafood] or meat." (AF 42). Employer explained that some of the Indian dishes are very complicated and time consuming and therefore the Cook "has to have experience and the cook should be aware of the procedure of Indian style cooking." (AF Id.).

The CO issued a Final Determination on February 19, 1998, denying certification. (AF 45-49). The CO found that the Employer failed to adequately demonstrate through documentation that the job offer was full time. The CO discussed the Employer's rebuttal and concluded that: "Based on the evidence provided by employer, it appears that the job opportunity only requires 5 hours during weekdays, and 4 hours on Saturdays. Twenty-nine hours ... per week is not full-time employment." (AF 48). In addition, the CO noted that Employer's rebuttal did not describe in detail the frequency of household entertaining in the twelve calendar month period immediately preceding the filing of the application. The CO also found that the Employer failed to adequately document business necessity for the live-in requirement. The CO noted that the Employer furnished no documentation to establish that the live-in requirement is necessary and essential to the household, without which the Employer would be unable to run the residence. (AF 47). In addition, the CO found that Employer's rebuttal does not satisfactorily document that the requirement for experience in a particular type of food (ethnic/religious) is a normal job requirement or that it arises from business necessity. (AF 46). The CO concluded that: "Employer's rebuttal did not provide evidence to support that an applicant with 2 years of cooking experience could not readily adapt to an Indian Style of cooking; evidence

to show that an applicant with no prior experience in Indian style cooking is incapable of preparing Indian style food; or document why employer, or anyone in her/his family, is unable to provide training or instruction in Indian style cooking, as was required by the NOF." (Id.).

The Employer filed a Motion to Reconsider on March 16, 1998. (AF 51-64). The CO did not rule on this motion, and the case was forwarded to the Board of Alien Labor Certification Appeals ("BALCA") for review. On July 29,1999, this matter was remanded under 1998-INA-233 to the CO for determination of the motion to reconsider. The Board held that assuming Employer's Motion to reconsider was timely filed, it must be decided by the CO and not by BALCA. *See Surendra Shah*, 1998-INA-233 (July 29, 1999) (citing *Harry Tancredi*, 1988-INA-441 (Dec. 1, 1988) (*en banc*) and *H.M. Carpet*, 1990-INA-398 (Aug. 14, 1990)). On November 10, 1999, the CO denied Employer's Request for Reconsideration, finding that the Motion did not raise such matters which could not have been addressed in the rebuttal. The application was then forwarded to BALCA for review.

Discussion

Under Section 656.21(b)(2), an employer must document that the job opportunity has been and is being described without unduly restrictive requirements. Where the worker is required to live on the premises, regardless of whether the employer is a commercial or noncommercial enterprise, the requirement will be regarded as unduly restrictive unless the employer shows that it arises from a business necessity. 20 C.F.R. section 656.21(b)(2)(iii). In the context of a domestic live-in worker, the relevant "business" is the "business" of running a household or managing ones personal affairs. *See Bernard Kruger, M.D.*, 1996-INA-48 (Feb. 9, 1998)*; Nandita Chowdhury*, 1993-INA-181 (Apr. 19, 1994); *Marion Graham*, 1988-INA-102 (Feb. 2, 1990) (*en banc*).

To establish the business necessity for a live-on-the-premises requirement for a Cook, the Employer must demonstrate that the job requirements bear a reasonable relationship to the occupation in the context of the Employer's business and are essential to perform, in a reasonable manner, the job duties as described by the Employer. *Information Industries, Inc.*, 1988-INA-82 (Feb. 8, 1989) (*en banc*). Pertinent factors with respect to the performance of job duties include the employer's occupation or commercial activities outside the home, the circumstances of the household itself, and any other relevant facts. These factors will be weighed on a case-by-case basis, and the presence or absence of any one concern in a particular case may not be determinative. *Bernard Kruger, M.D.*, supra.

In arriving at a decision on the issue of business necessity, written statements by an employer that are reasonably specific and identify their sources or bases constitute evidence that must be considered and weighed. *Gencorp., Inc.*, 1987-INA-659 (Jan. 13, 1988) (*en banc*). In live-in cases, a written assertion generally should, at the very least, be specific enough to enable the CO to determine that there are no cost-effective alternatives to live-in requirement and that the needs of the household for a live-in worker are genuine. Here, the Employer must demonstrate that the live-in requirement is essential to perform, in a reasonable manner, the duties of the job. Business necessity is not established where those duties can reasonably be performed by an employee who does not live on the premises. *Alan Squitieri*, 1990-INA-57 (April 9, 1992).

We have held that, in the absence of a necessity for care of a child or other dependant, a need only for the preparation of meals, as is the case here, could be satisfied by a live-out worker, even if the worker's schedule does not coincide with the employer's. *Mr. and Mrs. Robert Blumberg*, 1994-INA-244 (July 19, 1995); *Cynthia Bartky*, 1990-INA-440 (May 9, 1991). A live-out worker could prepare meals that can be heated up upon the Employer's return. *Mary Stafford*, 1988-INA-155 (Mar. 12, 1990). Similarly, occasional or periodic entertainment could readily be handled in the same manner. *See Eva Cooperman*, 1988-INA-113 (April 18, 1990).

In this case, the Employer's household consists of two adults, both of whom work full time and two children who are in school all day and are "old enough to take care of [themselves]." (AF 42). No duties of cleaning the house or child care are involved. While the Employer has asserted that his family entertains guests approximately 12 times in a year, the Employer has furnished no documentation to establish that a full time live-out worker would be any less responsible and responsive to the needs of the household than a live-in worker. Thus, we find that the Employer has not established the business necessity of the live-in requirement. The CO's denial of labor certification was, therefore, proper.

It is unnecessary to discuss the CO's finding of no full time employment under *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999) (*en banc*) and *Daisy Schimoler*, 1997-INA-218 (Mar. 3, 1999) (*en banc*), because of the Employer's failure to adequately rebut the finding of an unduly restrictive requirement. *See Elain Bunzel*, 1997-INA-481 (Mar. 3, 1999) (*en banc*).

Order

The Certifying Officer's denial of labor certification is hereby AFFIRMED.

For the Panel:

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DONALD B. JARVIS
Administrative Law Judge

San Francisco, California